INDEX

	Page
Opinions below	1
Jurisdiction	1
Questions presented	2
Statutes involved	2
Statement	2
Argument	3
Conclusion	6
Appendix	7

CITATIONS

Cases:	
General Tobacco & Grocery Co. v. *Fleming*, 125 F. 2d 596	4
McCullough v. *Kammerer Corp.*, 323 U. S. 327	6
Oklahoma Press Publishing Co. v. *Walling*, 327 U. S. 186	3, 4
Statutes:	
Fair Labor Standards Act of 1938, c. 676, 52 Stat. 1060, 29 U. S. C. 201:	
Sec. 6	5
Sec. 7	5
Sec. 9	7
Sec. 11 (a)	7
Sec. 11 (c)	5
Sec. 15 (a) (2)	5
Sec. 15 (a) (5)	5
Federal Trade Commission Act, 38 Stat. 717, 15 U. S. C. 49:	
Sec. 9	8

728946—47

In the Supreme Court of the United States

OCTOBER TERM, 1946

No. 855

DETWEILER BROS., INC., A CORPORATION, PETITIONER

v.

L. METCALFE WALLING, ADMINISTRATOR OF THE WAGE AND HOUR DIVISION, UNITED STATES DEPARTMENT OF LABOR

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the District Court (R. 46–49) is reported at 58 F. Supp. 201. The opinion of the Circuit Court of Appeals (R. 66–72) is reported at 157 F. 2d 841.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered on November 1, 1946 (R. 73). A petition for rehearing was denied on December 5, 1946 (R. 74). The petition for certiorari was filed on January 6, 1947. The jurisdiction of this

Court is invoked under Section 240 (a) of the Judicial Code, as amended.

QUESTIONS PRESENTED

1. Whether the District Court had power to order compliance with a subpoena duces tecum issued by the Administrator of the Wage and Hour Division, without a prior determination that petitioner is subject to the Fair Labor Standards Act.

2. Whether the District Court properly ordered petitioner to produce records relevant to coverage and to violations of the Act.

STATUTES INVOLVED

The statutory provisions involved are Sections 9 and 11 (a) of the Fair Labor Standards Act of 1938, c. 676, 52 Stat. 1060, 29 U. S. C. sec. 201, and Section 9 of the Federal Trade Commission Act, 38 Stat. 717, 15 U. S. C. 49. These provisions are set forth in the Appendix.

STATEMENT

After petitioner's refusal to permit inspectors of the Wage and Hour Division to examine its records for the purpose of determining whether it was violating the Fair Labor Standards Act (R. 9–19, 21–22), petitioner's president was served with a subpoena duces tecum signed by the Administrator of the Division, calling for the production of petitioner's records from October 24, 1940, to the date of the subpoena, relating to (1)

the wages paid to and hours worked by its employees, (2) the interstate aspects of its business, and (3) its retail or non-retail character (R. 23–24). Following petitioner's refusal to comply with the subpoena (R. 20–21), the Administrator in October 1944 applied to the District Court for an enforcement order, alleging that the records requested were "relevant, material and appropriate to determine whether [petitioner] has violated * * * the Act" (R. 7).

In response to an order to show cause (R. 25–27), petitioner denied that it was covered by the Act and urged that it was exempt as a retail establishment (R. 30–31). The Division's inspector filed an answering affidavit alleging on information and belief facts contravening the company's contentions (R. 42–43). The District Court ordered production of the records specified in the subpoena from October 24, 1940, to the date of the order (R. 49–51). The Circuit Court of Appeals for the Ninth Circuit affirmed (R. 72).

ARGUMENT

No questions of substance are presented which have not already been settled by *Oklahoma Press Publishing Co.* v. *Walling*, 327 U. S. 186, approving judicial enforcement of subpoenas substantially identical to that here involved. (R. 23–24; compare 327 U. S. at 210, n. 46, which sets forth the text of one of the subpoenas then before this Court.) It was there held that records similar to

those sought here are relevant to the investigations authorized by the Act, and that they may be obtained without a prior showing that the employer is subject to the wage and hour requirements of the Act. 327 U. S. at 210, 214, 216–217, especially notes 46–48 and 57.

Petitioner relies on four reasons for the allowance of the writ (Pet. 6–8).

(1) The first of these, conflict with *General Tobacco & Grocery Co.* v. *Fleming*, 125 F. 2d 596 (C. C. A. 6), was the reason assigned by this Court for granting certiorari in the *Oklahoma Press* case, 327 U. S. at 192, n. 5; and the decision in the latter case effectively resolved the conflict with the *General Tobacco* case.

(2) The second reason is that the District Court abused its discretion by ordering that the subpoena be enforced, even though it was of the view that "The weight of the affidavits are in favor of the respondent [the employer]" (R. 47). That questions of coverage or exemption are not before a district court in dealing with an application by the Administrator for the enforcement of a subpoena is expressly held in the *Oklahoma Press* case, 327 U. S. at 214, 217, n. 57. Moreover, the District Court's observations in this respect seem to have been based simply upon the fact that the Administrator's affidavit was on information and belief, while the company's affidavits were "positive" (R. 47).

(3) The third reason is based on a supposed ambiguity in the Administrator's application to the District Court. One paragraph of the application stated that the investigation for which the records were sought was to determine whether there were violations of Sections 7, 11 (c), 15 (a) (2), and 15 (a) (5), while another paragraph added Section 6 (the minimum wage section) to the list. Inasmuch as the same pay-roll records would be required to determine minimum wage violations under Section 6 as would be required to determine overtime violations under Section 7, the basis for petitioner's complaint on this score is difficult to perceive.

(4) The final reason is drawn from the fact that the order of the District Court required production of petitioner's records from October 24, 1940, "to date", and was dated on the day of its entry, which was of course subsequent to the date of the subpoena. Hence, argues petitioner, the District Court's order required the production of records not called for by the subpoena, which similarly required production of records "to date". We believe the argument contains its own refutation. In any event, it may be noted that the application specifically requested not only enforcement of the subpoena but also "such other and further relief as may be necessary and appropriate" (R. 8). The order of the District Court was undoubtedly responsive to the applica-

tion since records to the most recent date are appropriate to accomplish the purpose of the Administrator's investigation. Moreover, the contention is raised here for the first time. *McCullough* v. *Kammerer Corp.*, 323 U. S. 327.

CONCLUSION

For the reasons stated, it is respectfully submitted that the petition for certiorari should be denied.

GEORGE T. WASHINGTON,
Acting Solicitor General.

WILLIAM S. TYSON,
Solicitor,
United States Department of Labor.

JANUARY 1947.

APPENDIX

Fair Labor Standards Act, c. 676, 52 Stat. 1060 U. S. C. 201):

SEC. 9. For the purpose of any hearing or investigation provided for in this Act, the provisions of sections 9 and 10 (relating to the attendance of witnesses and the production of books, papers, and documents) of the Federal Trade Commission Act of September 16, 1914, as amended (U. S. C., 1934 edition, title 15, secs. 49 and 50), are hereby made applicable to the jurisdiction, powers, and duties of the Administrator, the Chief of the Children's Bureau, and the industry committees.

* * * * *

SEC. 11 (a). The Administrator or his designated representatives may investigate and gather data regarding the wages, hours, and other conditions and practices of employment in any industry subject to this Act, and may enter and inspect such places and such records (and make such transcriptions thereof), question such employees, and investigate such facts, conditions, practices, or matters as he may deem necessary or appropriate to determine whether any person has violated any provision of this Act, or which may aid in the enforcement of the provisions of this Act. Except as provided in section 12 and in subsection (b) of this section, the Administrator shall utilize the bureaus and divisions of the Department of Labor for all the investigations and inspections neces-

sary under this section. Except as provided in section 12, the Administrator shall bring all actions under section 17 to restrain violations of this Act.

Federal Trade Commission Act, 38 Stat. 717 (15 U. S. C. 49):

SEC. 9.

* * * * * * *

* * * in case of disobedience to a subpoena the commission may invoke the aid of any court of the United States in requiring the attendance and testimony of witnesses and the production of documentary evidence.

Any of the district courts of the United States within the jurisdiction of which such inquiry is carried on may, in case of contumacy or refusal to obey a subpoena issued to any corporation or other person, issue an order requiring such corporation or other person to appear before the commission, or to produce documentary evidence if so ordered, or to give evidence touching the matter in question; and any failure to obey such order of the court may be punished by such court as a contempt thereof.

U. S. GOVERNMENT PRINTING OFFICE: 1947